

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LENORA JESONEK)	
Claimant)	
VS.)	
)	Docket Nos. 1,017,347
)	& 1,017,348
KOCH & COMPANY)	
Respondent)	
AND)	
)	
INDIANA LUMBERMENS MUTUAL INSURANCE CO.))	
Insurance Carrier)	

ORDER

Claimant appealed the February 4, 2008, preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

ISSUES

Claimant alleges she injured or aggravated her right hip as the natural consequence of a left foot injury that she sustained while working for respondent. In the February 4, 2008, Order, Judge Benedict denied claimant's request for medical treatment for her right hip after finding claimant failed to prove her right hip problem was caused by her earlier left foot injury.

Claimant contends Judge Benedict erred. Claimant argues Dr. Edward J. Prostic's opinion that related claimant's right hip problems to her left foot injury was not contradicted. Accordingly, claimant argues the Judge ignored uncontradicted evidence and, therefore, the Board should reverse the February 4, 2008, Order.

Conversely, respondent and its insurance carrier (respondent) contend the Board does not have jurisdiction to review the February 4, 2008, Order as "K.S.A. 44-534a specifically grants authority to an ALJ to decide issues concerning the furnishing of medical treatment."¹ In the alternative, respondent argues Dr. Greg A. Horton contradicted

¹ Respondent's Brief at 2 (filed March 10, 2008).

Dr. Prostic's opinion regarding the cause of claimant's right hip complaints. In that vein, respondent argued:

Opposing counsel contends in his brief to the Board that Dr. Prostic's opinion was "uncontradicted evidence" as to the causation of Claimant's hip pain. Only a warped and narrow reading of the report of Dr. Horton would convey such a conclusion. Dr. Horton specifically noted that he did not find, absent evidence of a discrete injurious event, a causal connection between the hip pain and the foot injury. Opposing counsel argues that this statement amounts to there being no evidence that the brace did not cause the hip symptoms. Opposing counsel argues that the opinion of Dr. Horton amounts to a statement of "I'm not sure" what caused the hip pain. However, it is clear that Dr. Horton knew he was to evaluate the Claimant for her hip pain and issue an opinion on whether he thought it was related to her foot injury. He did not find a connection.²

Respondent argues the parties agreed Dr. Horton would evaluate claimant and his opinion is more credible than claimant's hired medical expert, Dr. Prostic. Accordingly, respondent requests the Board either to dismiss this appeal or affirm the Order.

The only issues before the Board on this appeal are:

1. Does the Board have the jurisdiction to review the preliminary finding regarding whether claimant either injured or aggravated her right hip as the natural consequence of the left foot injury she sustained at work?
2. If so, did claimant satisfy her burden of proof?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned finds and concludes:

Claimant worked for respondent for approximately five years. The parties agree she sustained a left foot injury during her employment with respondent, which is compensable under the Workers Compensation Act. Claimant testified she injured her left foot while pushing on a cart loaded with wood.

Respondent acknowledges that claimant injured her foot at work. But respondent disputes claimant's contention that her right hip problems are the natural consequence of her left foot injury.

² *Id.* at 4.

Claimant testified she last worked for respondent in either June or July 2005. After being unemployed for several months, in February 2006 claimant began working for Wal-Mart, where she worked until August 2006, or for approximately six months. At Wal-Mart claimant worked on a concrete floor and was on her feet approximately 95 percent of the time.

While working at Wal-Mart, claimant developed pain in her right hip. Claimant testified the orthotic she was given for her left foot modified the manner in which she walked and within three months of commencing her employment with Wal-Mart she noticed a twinge in her right hip. The symptoms in the right hip worsened to the point claimant left Wal-Mart's employment. Claimant testified, in part:

Q. (Mr. Bryan) When you went back to working when you were on your feet all the time, how did you get along?

A. (Claimant) I was wearing the AFO that goes in the shoe, and I was -- it did make me walk differently. I had to keep correcting my gait.

Q. How long did you wear that?

A. All the time I was at Walmart, for six months.

Q. Did -- at some point in time did you develop problems with your right hip?

A. Yes.

. . . .

Well, walking back and forth -- I didn't do anything physical, but I did a lot of walking at Walmart, walking back and forth. Within three months I started noticing a little twinge, and that just got worse as time progressed, and I just couldn't stand up any more, stand to walk to do the job.

Q. Is that why you left Walmart?

A. Yes.³

Claimant was eventually given a hard plastic insert to use in place of the original orthotic. The insert has improved her left foot symptoms but it has not resolved her right

³ P.H. Trans. at 10.

hip symptoms. According to claimant, her right hip symptoms improved when she was off work between jobs but it has since “gotten worse with movement.”⁴

Claimant attributes her right hip problems to the orthotic, which caused her to walk with an uneven gait. She testified, in part:

Q. (Mr. Bryan) Is there anything that you can think of that -- or let's put the question another way. What makes you think that it was the AFO or this brace that is the cause of you having -- on your left foot that caused you to have the problems with your right hip?

A. (Claimant) Because of walking differently, walking funny, shorter, uneven gait.⁵

According to claimant, the brace prevented her left ankle from moving. Claimant testified, “It made me walk a little differently. It made me not quite limp, but it just -- I walked differently with that on.”⁶

In October 2006, claimant returned to Dr. Greg A. Horton for further evaluation. The doctor had previously treated claimant and had provided the orthotic brace that claimant was wearing when her right hip symptoms began. At their October 2006 meeting, the doctor noted the following history:

Lenora is here today for reevaluation . . . of her foot. She states that she has been working for six months and wore her brace at work. She admits that the brace is beneficial for her foot but has complaints of pain in her right hip. Her hip pain initially would improve with rest on her days off from work but eventually became constant. She has since quit her job, and does not wear her brace when she is at home. She does wear an insert in her shoe at home, and she continues to wear her brace on a situational basis. Her current complaints are that of pain in her hip, although it has improved some since she has quit working. She has pain with laying on her side in bed as well. She is here today for my evaluation and treatment recommendations.⁷

Dr. Horton diagnosed trochanteric bursitis in claimant's right hip. Moreover, the doctor found claimant's gait was “reciprocal without any evidence of a demonstrable limp.”⁸ And

⁴ *Id.* at 11.

⁵ *Id.* at 15, 16.

⁶ *Id.* at 13.

⁷ *Id.*, Resp. Ex. A at 1.

⁸ *Id.*

the doctor noted, "In the absence of a discrete injurious event, I don't find anything compelling to relate her right hip with her left foot."⁹

At the October 2006 evaluation, Dr. Horton gave claimant a corticosteroid injection in the right hip. According to claimant the beneficial effects of that injection dissipated when claimant returned to work.

After being unemployed for several months, claimant began working for Nemaha County Training Center in April 2007 where she supervises developmentally disabled individuals. She now spends approximately 50 percent of the day on her feet. More importantly, she is now able to sit as needed. Nevertheless, her right hip symptoms have increased.

At her attorney's request, claimant was evaluated by Dr. Edward J. Prostic in December 2007. Claimant advised the doctor she had increasing pain in her foot and hip with progressive standing and walking. In his December 5, 2007, report to claimant's attorney, Dr. Prostic recommended exercises and additional steroid injections. In a follow-up letter to claimant's attorney dated January 4, 2008, Dr. Prostic stated:

It is my belief that the abnormal gait while wearing the AFO for the left lower extremity was sufficient to lead to the trochanteric bursitis of the right hip. I do not recommend treatment for the right hip other than steroid injections, anti-inflammatory medicines by mouth, and stretching exercises for the iliotibial band.¹⁰

The undersigned finds claimant's right hip symptoms are directly related to her left foot injury. Claimant's testimony is persuasive that her orthotic brace modified her gait and the way she walked. And Dr. Prostic likewise attributes claimant's hip symptoms to her foot injury and the resulting abnormal gait. Although Dr. Horton does not find anything compelling to relate claimant's hip symptoms to her left foot, he does not provide any other explanation for claimant's hip symptoms. In short, the evidence indicates claimant's right hip was asymptomatic before her left foot injury caused her to alter her gait.

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*¹¹, the Court held:

⁹ *Id.*

¹⁰ *Id.*, Cl. Ex. 1.

¹¹ *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

Here, claimant's right hip symptoms gradually developed after she returned to work and began walking on a consistent basis with her orthotic brace. The undersigned finds that constitutes a natural and direct consequence of the left foot injury and, therefore, it is compensable in this claim.

In conclusion, the February 4, 2008, preliminary hearing Order should be reversed and this claim should be remanded to the Judge to address claimant's request for medical care and treatment of her right hip.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹² Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned reverses the February 4, 2008, Order and finds that claimant has established that her right hip symptoms are the natural and direct consequence of her left foot injury. In addition, the undersigned remands this claim to the Judge for further proceedings to address claimant's request for medical care and treatment of her right hip.

IT IS SO ORDERED.

Dated this ____ day of April, 2008.

KENTON D. WIRTH
BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Michael P. Bandre, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge

¹² K.S.A. 44-534a.